

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

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JIM GRAHAM )  
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v.             )  
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DISTRICT OF COLUMBIA BOARD OF ETHICS     )  
AND GOVERNMENT ACCOUNTABILITY     )  
               )  
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**COUNCILMEMBER JIM GRAHAM'S MEMORANDUM**  
**IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER**  
**AND A PRELIMINARY INJUNCTION**

## **INTRODUCTION**

An emergency injunction is necessary to prevent the unlawful findings of the February 7, 2013 Memorandum Opinion of the District of Columbia Board of Ethics and Government Accountability (“BEGA”) from significantly and irreparably harming Councilmember Jim Graham. BEGA made its “findings” and concluded that Mr. Graham violated provisions of the D.C. Code of Conduct without affording him any of the process required by statute, by BEGA’s own rules, and by the Due Process Clause. Mr. Graham has suffered grievous harm to his reputation and endured a barrage of negative media treatment as a result of BEGA’s actions. Without this Court’s immediate intervention, the D.C. Council will likely sanction Mr. Graham on the basis the so-called findings in the BEGA opinion. These sanctions, which may include an official reprimand and loss of some of Mr. Graham’s committee assignments, will cause grave and irreparable harm to Mr. Graham’s professional reputation, and damage his ability to serve in the position to which he was elected. If the Council reprimands Mr. Graham based on BEGA’s unlawful action, he will have no remedy at law to challenge the reprimand.

Mr. Graham has attempted to secure resolution of this dispute without Court intervention. But, with action by the D.C. Council imminent, Mr. Graham has no choice but to seek this Court’s intervention to avoid immediate and irreparable harm.

## **PRELIMINARY STATEMENT**

This matter arises from a February 7, 2013 Memorandum Opinion of the District of Columbia Board of Ethics and Government Accountability (“BEGA”) in which the newly-created BEGA dismissed a preliminary investigation into certain conduct of District of Columbia Councilmember Jim Graham, but – contrary to law and to its own rules – made “factual findings” and legal conclusions that Mr. Graham had violated three provisions of the DC Code of

Conduct. BEGA's findings and conclusions violated the statute which conveys BEGA its authority, as well as its own rules, and denied Mr. Graham the due process to which he was entitled under both the Ethics Act and the United States Constitution. BEGA's findings have caused Mr. Graham reputational harm, and he faces imminent and irreparable harm to his fifteen-year career as a sitting member of the D.C. Council this week, absent intervention from this Court.

On February 8, 2013, Tommy Wells, a Councilmember from Ward 6, wrote to D.C. Council Chairman Phil Mendelson citing BEGA's Memorandum Opinion and requesting that on the basis of it Mr. Mendelson establish an ad hoc committee to consider "evidence of a violation of the Code of Conduct and make recommendations for further action." *See* Exh. 1. This week, D.C. Council Chairman Philip Mendelson will introduce resolutions that would propose, *inter alia*, sanctions against Mr. Graham including the potential loss of his committee assignments on the Council. The predicate on which the Council could take this action is the unlawful decision issued by BEGA. *See* Graham Affidavit, Exh. 2.

Mr. Graham satisfies all the criteria for the issuance of a temporary restraining order and a preliminary injunction. First, Mr. Graham is likely to succeed in his separately filed petition for review of BEGA's actions. In that petition, Mr. Graham argues that BEGA's Memorandum Opinion was contrary to law and BEGA's own rules and denied Mr. Graham the due process to which he was entitled under both the Government Ethics Act and the U.S. Constitution. As a result, in his petition, Mr. Graham asks that this Court enter an order stating that BEGA's Memorandum Opinion was contrary to law and that its so-called "factual findings" and conclusions that Mr. Graham acted contrary to the DC Code of Conduct laws must be stricken.

Second, Mr. Graham will suffer irreparable harm if BEGA's findings are not withdrawn. As soon as today, Mr. Mendelson may introduce resolutions to sanction Councilmember Graham on the basis of the findings in the BEGA opinion. The harm to Mr. Graham's public image is also ongoing, as the press continues to treat BEGA's opinion as though it was the result of a fair process. The Washington Post has called for Mr. Graham to resign his seat on the Council. *See Editorial, Jim Graham Should Resign from D.C. Council, Wash. Post (Feb. 7, 2013).*

Third, an injunction will not cause any harm to other parties. BEGA will suffer no conceivable harm from an order striking its unlawful factual findings and legal conclusions regarding Mr. Graham's conduct. Its failure to adhere to the law and its rules merits the relief requested in any event. Further, Mr. Graham does not seek to disturb BEGA's separate February 7, 2013 Order of Dismissal of the preliminary investigation.

Finally, ensuring that elected officials, and *all* District of Columbia employees over whom BEGA can assert jurisdiction, are not subjected to a lawless ethics enforcement regime is in the public interest. The public's interest in a credible ethics process supports Mr. Graham's request for relief here. The public deserves an ethics process that is fair to all who will be called upon to defend their reputations and livelihoods against allegations of unethical conduct.

#### **STATEMENT OF FACTS**

##### **1. Basis of BEGA's Preliminary Investigation.**

In November 2012, the newly-created BEGA announced that it had opened a preliminary investigation into Councilmember Graham's conduct on the basis of information acquired from a report prepared by Cadwalader, Wickersham & Taft LLP (the "Cadwalader Report") on behalf of the Washington Metro Area Transit Authority ("WMATA" or "Metro"). The Cadwalader Report, Exh. 4, examined Councilmember Graham's conduct with regard to negotiation of a joint

development project of WMATA property on Florida Avenue, NW (the “Florida Avenue Project”). Councilmember Graham served as a member of the WMATA Board during the negotiation of the Florida Avenue Project; he also was a sitting councilmember.

At the center of the inquiry was Mr. Graham’s interaction with an individual named Warren Williams, Jr., who was a principal in Banneker Ventures, one of the bidders for the Florida Avenue Project. Mr. Williams also was a partner in a firm bidding for the District of Columbia lottery contract, which was under consideration by the D.C. Council around the same time. According to the Cadwalader Report, Mr. Graham told Mr. Williams in a May 2008 meeting that Mr. Graham would consider supporting Mr. Williams’ company for the lottery contract if Mr. Williams withdrew from his company’s participation in the bid for the WMATA Florida Avenue Project. Exh. 4 at 40. In his written submission, Mr. Graham vigorously refuted Mr. Williams’ account of the meeting, which was supported by less than half of the participants at that meeting. Exh. 5 at 4-5. He also rejected any notion that he improperly favored a separate firm, LaKritz Adler, which was bidding for the Florida Avenue Project. *Id.* at 6-7. In the end, Mr. Graham cast his vote to support Mr. Williams’ firm, Banneker Ventures, which entered the highest bid for the Florida Avenue Project. Exh. 4 at 21. The Cadwalader Report concluded that Mr. Graham’s comment to Mr. Williams created a “conflict of interest,” or at least the appearance of such a conflict, between his role as a Councilmember and his role on the WMATA Board. *Id.* at 5. The Cadwalader Report explicitly stated that it found “no evidence” that any WMATA Board member, including Mr. Graham, took actions that were motivated by furthering their own financial interests. *Id.* at 43.

On November 14, 2012, BEGA sent Mr. Graham a letter asking him to respond to the factual findings contained in the Cadwalader Report and for Mr. Graham’s response regarding

whether his conduct discussed in the report violated certain provisions of the District of Columbia Code of Conduct. *See* Exh. 6. The letter stated that BEGA had opened a preliminary investigation into the matter. *See id.* (“[T]his inquiry is routine under the Ethics Act which requires a preliminary investigation to be conducted in certain instances.”).

2. BEGA’s Governing Statute and Rules.

Throughout this matter, BEGA acted in violation of the statutory authority granted it under the Government Ethics Act of 2011 (the “Act”), Title II of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*). A brief overview of the relevant provisions of the Act, most of which are also embodied in BEGA’s rules, is important.

At all times relevant to this matter, BEGA purported to act under its statutory authority to conduct “preliminary investigations,” as authorized by D.C. Code § 1-1162.12. The Act provides that the Director of BEGA “shall conduct a preliminary investigation of a possible violation of the Code of Conduct or of the Act brought to the attention of the Director by any source including but not limited to: (a) the media; (b) a tip received through the hotline; or (c) documents filed with the ethics board.”<sup>1</sup> *Id.* § 1-1162.12(a). The statute further states as to preliminary investigations: “The identity of an individual who is the subject of the preliminary investigation shall not be disclosed without the individual’s consent unless or until the Board finds reason to believe that the individual has committed a violation and that disclosure would not harm the investigation.” *Id.* § 1-1162.12 (d).

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<sup>1</sup> The preliminary investigation in this case was initiated prior to the BEGA Director assuming his role; upon information and belief, the BEGA Chair initiated the preliminary investigation, *sua sponte*, upon reviewing the Cadwalader Report.

The purpose of the preliminary investigation is to determine whether the evidence merits proceeding to a formal investigation. The Director of Government Ethics conducts a preliminary investigation into possible violations: “If during or after the preliminary investigation, the Director of Government Ethics has reason to believe that a violation of the Code of Conduct or of the Act may have occurred, the Director shall present evidence of the violation to the Board.” D.C. Code § 1-1162.12(b). The Board then decides whether to authorize a formal investigation. The standard for proceeding to the formal investigation stage is whether the Board finds that there is “*reason to believe that a violation has occurred.*” *Id.* (emphasis added).

If the Board proceeds to the formal investigation, the Board *must* “conduct an open and adversarial hearing at which the Director of Government Ethics shall present evidence of the violation.” *Id.* § 1-1162.14(a). By statutory command, BEGA’s hearings must be held in accordance with the same process afforded in other contested cases before administrative agencies in the District. *Id.* (“Any hearing under this section shall be of record and shall be held in accordance with Chapter 5 of Title 2”), *see* D.C. Code § 2-509. BEGA’s rules thus provide elaborate detail regarding the process for conducting an adversarial hearing. *See generally*, D.C. Mun. Regs. tit. 3, §§ 5500 *et seq.* (attached as Exhibit 7). For example, the respondent is entitled to fulsome discovery in advance of the adversarial hearing. *Id.* § 5511.3. (“the Director must disclose to the respondent and make available for inspection, copying, or photographing any relevant written or recorded statements made by the respondent and any . . . evidence which is in the possession of the Director and which . . . the Director intends to introduce at the hearing; or . . . [a]re material to the preparation of the respondent’s defense.”) Further, at the adversarial hearing, “[a]ll parties . . . have the right to produce evidence and witnesses on their behalf and to rebut or explain testimony or other evidence against them.” *Id.* § 5517.1. Additionally, “[a]ll

parties have the right to cross-examine other parties and witnesses and to offer argument or explanation in support of their positions or contentions.” *Id.* § 5517.2. “In all cases involving a notice of violation, the Director has the burden of persuading the Board that a violation has occurred by substantial evidence.” *Id.* § 5518.1. At the close of the adversarial hearing, “[t]he Board may request parties to submit proposed findings of fact and conclusions of law for the consideration of the Board.” *Id.* § 5520.1. “Within a reasonable time after the conclusion of the hearing, the Board shall render its decision setting forth findings of fact and conclusions of law and giving the reasons for the decision.” *Id.* § 5521.1. “*The conclusions or opinion in the decision shall be governed and based upon all the evidence adduced at the hearing.*” *Id.* § 5521.3 (emphasis added). The decision “shall be supported by substantial evidence on the record.” *Id.* § 5521.4.

3. Councilmember Graham’s Response and Denial of Requests for Discovery.

BEGA’s November 14, 2012 inquiry letter contained only a copy of the Cadwalader Report. *See* Exh. 6. It noted that the Cadwalader Report made findings and conclusions that Mr. Graham violated WMATA’s standards of conduct. It then asked Mr. Graham to provide an explanation regarding (1) whether he disputed any of the factual findings in the Cadwalader Report; and (2) whether he believed his conduct violated certain provisions of the DC Code of Conduct. *Id.* Through counsel, Mr. Graham requested that BEGA provide him with the entire record underlying the Cadwalader Report in order for him to prepare his response. *See* Exh. 9. Those requests were denied on the ground that BEGA need only provide discovery to a respondent at the formal investigation stage, as opposed to a preliminary investigation. *Id.* On the same basis, BEGA declined to provide Mr. Graham’s counsel with Mr. Graham’s own sworn statement made when he cooperated with the Cadwalader investigation. Mr. Graham thus

prepared his response to BEGA's November 14 inquiry letter based entirely on the contents of the Cadwalader Report, limited of course by which excerpts of its own record Cadwalader chose to include, and which was prepared internally for WMATA, not for the purpose of addressing potential violations of the DC Code of Conduct.

On December 11, 2012, Mr. Graham, through counsel, submitted his response to BEGA's inquiry letter. *See* Exh 5. In that response, Mr. Graham disputed several facts contained in the Cadwalader Report. The response also argued that, even accepting the facts as Cadwalader presented them, Mr. Graham's conduct did not constitute a violation of the DC Code of Conduct. Finally, the response made several procedural arguments urging that BEGA dismiss the preliminary investigation, including, *inter alia*: (1) that certain of the Code of Conduct provisions were so vague as to violate due process; (2) that the statute of limitations had run on the purportedly problematic behavior, which occurred in 2008; (3) that BEGA could not sanction Mr. Graham for conduct that had occurred in 2008 without violating the *Ex Post Facto* Clause.

Mr. Graham's counsel also asked to present oral argument before the Board. While noting that its rules did not provide for any such opportunity at the Preliminary Investigation stage, the Director notified Mr. Graham's counsel that it would be permitted to appear at the January 18, 2013 meeting of the Board and make a presentation. *See* Mehta Aff. ¶¶ 7, 8, Exh. 10. Mr. Graham's counsel did so, giving a roughly ten minute presentation of the arguments contained in Mr. Graham's response and then answering BEGA members' questions regarding Mr. Graham's arguments. *Id.* ¶ 9. At no time during that meeting, or ever, did BEGA suggest that it was considering making factual and legal findings in the Graham matter without providing any discovery to Mr. Graham or otherwise adhering to the process required by statute and its own rules. *Id.* ¶¶ 10, 11.

4. BEGA Dismisses the Preliminary Investigation and Issues a 27 Page Set of “Factual Findings” and Legal Conclusions.

On February 7, 2013, at its regular meeting, BEGA announced its decision in the Graham preliminary investigation. BEGA concluded that *Ex Post Facto* principles precluded it from imposing any sanctions against Mr. Graham, and that accordingly it would dismiss the preliminary investigation. *See* Exh. 3. However, in a 27-page Memorandum Opinion, BEGA made several factual findings against Mr. Graham and concluded that Mr. Graham violated three provisions of the District’s Code of Conduct. *See id.*

Citing to the record “evidence” to which Mr. Graham and his counsel were denied access, much less any opportunity to confront, BEGA made myriad “factual findings” by “substantial evidence” regarding issues raised by the Cadwalader Report, as well as issues found nowhere in the Cadwalader Report. On the seminal factual dispute in the underlying matter, BEGA wrote that: “the weight of the evidence supports a finding by substantial evidence that Councilmember Graham did, in fact, offer to support Mr. Williams and W2I if he and Banneker Ventures withdrew from the WMATA development project.” Exh. 3 at 13.

BEGA also made findings regarding Councilmember Graham’s motives for allegedly preferring LaKritz Adler to Banneker Ventures. BEGA “conclude[d], based on the evidence before us, that Councilmember Graham demonstrated a strong preference that LaKritz Adler be awarded the WMATA development project notwithstanding the recommendation of the WMATA joint development committee that its bid would not provide the best return for WMATA.” *Id.* at 16. The Board went on to find that the “evidence strongly suggests that Councilmember Graham was motivated, at least in part, by the fact that LaKritz Adler contributed to his campaign and that Banneker and Mr. Williams contributed to his opponent.” *Id.* This “finding” would have been easily refuted if Mr. Graham been given an opportunity;

indeed, the Cadwalader Report found *no* evidence that Mr. Graham's actions were motivated by any such interest.<sup>2</sup> The harm caused by this false "finding" cannot be overstated.

BEGA went on to make additional factual findings adverse to Mr. Graham by "substantial evidence," including: (1) resolving a dispute over the underlying purpose of the May 2008 meeting between Mr. Graham and Mr. Williams, *see id.* at 7, ("The weight of the evidence supports a finding that the purpose of the meeting, as originally scheduled, was to discuss the lottery contract;") (2) resolving a "dispute as to who requested that Mr. and Mrs. Williams attend the May 2008 meeting," finding that "Councilmember Graham made the request," *id.* at 8; (3) refuting Mr. Graham's explanation of a key email, *id.* at 12 ("We find [Councilmember Graham's] explanation unconvincing."); (4) assigning a personal motive to Mr. Graham's conduct with regard to Mr. Williams, *id.* at 17 ("There is substantial evidence that Councilmember Graham bore great personal animosity toward Mr. Williams"); and (5) concluding that Mr. Graham was motivated by animus in his vote on both the lottery contract and the Florida Avenue Project, *id.* at 18 ("The weight of the evidence is that Councilmember Graham used that personal animus and his vote on the District lottery contract to pressure Banneker's withdrawal from the WMATA deal.").

Despite concluding that it must dismiss the preliminary investigation, and despite its failure to conduct the adversarial hearing *required* by statute, BEGA went even further, finding that Mr. Graham violated three provisions of the District's Code of Conduct. BEGA stated that

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<sup>2</sup> Indeed, the Cadwalader Report contains no mention of LaKritz Adler's campaign contributions to Councilmember Graham. Because Mr. Graham was asked to respond only to the factual findings in the Cadwalader Report, and his counsel was denied access to the underlying materials, Mr. Graham never had the opportunity to address the notion that Mr. Graham was motivated to include LaKritz Adler in the Florida Avenue Project because of campaign contributions, and was not on notice that BEGA was considering such a theory. BEGA's finding on this point is patently false, but Mr. Graham was given no opportunity to refute it.

it had “weighed the evidence” and concluded that Mr. Graham had engaged in those violations. Mem. Op. at 16 (“The weight of the evidence before the Board demonstrates that [Mr. Graham] acted contrary to these obligations.”); *id.* at 18 (“[W]e find that the conduct of Councilmember Graham displayed a complete lack of partiality.”); *id.* at 20 (“[W]e find there is substantial evidence that Councilmember Graham’s conduct violated [6B D.C. Mun. Regs 1803.1(a)(6)].”

#### 4. Imminent Action by the D.C. Council

On the day after the BEGA Memorandum Opinion issued, the Washington Post editorial board ran an editorial calling for Mr. Graham’s resignation from the D.C. Council. *See Editorial, Jim Graham Should Resign from D.C. Council*, Wash. Post (Feb. 7, 2013). The Post and other media outlets have also urged the D.C. Council, in particular its Chairman Phil Mendelson, to take action against Mr. Graham based on the BEGA Memorandum Opinion. *See, e.g., Editorial, Phil Mendelson Is Awfully Quite about Jim Graham’s Troubles*, Wash. Post (Feb. 11, 2013); Jonetta Rose Barras, *Crime and No Punishment in D.C.*, Wash. Examiner (Feb. 11, 2013); Mike DeBonis, *All Eyes on Mendo*, WashingtonPost.com (Feb. 12, 2013); Colbert I. King, *D.C. Council Should Censure Jim Graham*, Wash. Post (Feb. 11, 2013). Tommy Wells, a Councilmember from Ward 6, wrote to D.C. Council Chairman Phil Mendelson citing BEGA’s Memorandum Opinion and requesting that on the basis of it Mr. Mendelson establish an ad hoc committee to consider “evidence of a violation of the Code of Conduct and make recommendations for further action.” *See* Exh. 1.

This week, and as soon as today, D.C. Council Chairman Philip Mendelson will introduce resolutions that would propose, *inter alia*, sanctions against Mr. Graham including the potential loss of his committee assignments on the Council. The predicate on which the Council could take this action is the unlawful decision issued by BEGA. *See* Graham Affidavit, Exh. 2.

## **ARGUMENT**

Courts must weigh four factors in deciding whether to grant a temporary restraining order or preliminary injunction: (1) whether there is a substantial likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not granted; (3) whether the injunction will substantially injure other interested parties; and (4) whether the public interest would be furthered by the injunction. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255-56 (D.C. 2003). Mr. Graham satisfies all four criteria and, therefore, this Court should grant his motion for emergency injunctive relief.

### **1. Mr. Graham is Likely to Succeed on the Merits of his Petition for Review.**

In his petition for review, Mr. Graham argues that BEGA's Memorandum Opinion was contrary to law and BEGA's own rules and denied Mr. Graham the due process to which he was entitled under both the Government Ethics Act and the U.S. Constitution. Given that BEGA acted in clear violation of its authorizing statute and its own rules and regulations, Mr. Graham is likely to succeed on the merits. Further, he is likely to succeed in his argument that BEGA's Memorandum Opinion violated his right to due process.

#### **a. BEGA Acted Outside its Statutory Authority by Issuing its Memorandum Opinion without Conducting an Adversarial Hearing.**

In his petition, Mr. Graham first points out that an agency that acts in contravention of its statutory authority violates the District of Columbia's Administrative Procedure Act by failing "to observe procedure required by law." D.C. Code § 2-510(a)(3)(D). By operation of the statute that created it, BEGA may make "findings of fact" and draw conclusions that a violation of the Code of Conduct has been established by "substantial evidence" only *after* a formal investigation and adversarial hearing. D.C. Code § 1-1162.14. At the preliminary investigation stage, the Board's only proper inquiry is whether there is "reason to believe that a violation has

occurred.” *Id.* § 1-1162.12. As discussed below, however, BEGA simply ignored its own rules in this matter.

By issuing its Memorandum Opinion, BEGA acted as though it had both completed the preliminary investigation and conducted the *formal* investigation, despite the fact that it concluded it must dismiss the former on constitutional grounds, and it never even initiated the latter. Mr. Graham was therefore effectively convicted without a trial. The *only* instance in which BEGA may forego a hearing is if it dismisses its investigation based on a finding that there is no merit to the complaint. *See* D.C. Code § 1-1162.14(a) (1) (“A hearing need not be conducted if a matter is dismissed pursuant to § 1-1162.16(a).”); *see id.* at § 1-1162.16(a) (“The Ethics Board may dismiss, at any stage of the proceedings, any claim, complaint, request for investigation, investigation, or portion of an investigation that the Ethics Board finds to be without merit.”).

The Board’s dismissal here was based on its inability to sanction Mr. Graham consistent with the *Ex Post Facto* clause of the United States Constitution. It was not a dismissal on the merits as contemplated by § 1-1162.16(a). Indeed, the Board not only found there *was* reason to believe that Mr. Graham committed ethics violations, it then did an end run around the statute by dismissing the investigation, but only after conducting ex parte fact finding, failing to provide any discovery, and ignoring its statutory mandate that it “shall” conduct a full adversarial hearing if it proceeds on the basis that there is “reason to believe” a violation occurred. Having concluded it could not sanction Mr. Graham consistent with the Constitution, BEGA nonetheless extracted its pound of flesh by making countless factual “findings” and concluding that Mr. Graham violated the law without affording him any process whatsoever. There is no question that the Act requires such process before factual findings and legal conclusions can be made, for

the obvious reason that respondents' reputations, careers, and livelihoods are at stake. Consideration of Mr. Graham's petition for review will require no more than reference to the statute that governs BEGA's conduct of investigations and a review of the undisputed facts of how it conducted itself in Mr. Graham's investigation.

*b. BEGA Violated the DC Administrative Procedure Act by Failing to Follow Its Own Rules.*

Mr. Graham's second argument in his petition is that, in addition to violating the statute which created it, BEGA's failure to follow its own regulations constitutes a separate violation of the District of Columbia Administrative Procedure Act. "It is a basic tenet of administrative law that an administrative agency is bound to follow its own rules and regulations." *Macaulay v. District of Columbia Taxicab Comm'n*, 623 A.2d 1207, 1209 (D.C. 1993) (citations omitted); *see also Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40, 59 (2005) (federal agencies must follow their own rules). An agency's failure to do so renders its actions arbitrary and capricious, an abuse of discretion, and not in accordance with law. D.C. Code § 2-510(a)(3)(A); *accord Ingram Barge Co. v. United States*, 884 F.2d 1400, 1405 (D.C. Cir. 1989) ("Thus, even if the [agency] had made and then breached a promise to depart from its own regulation, its departure – not its return to the established course – would be arbitrary and capricious."); *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008) ("It is a fundamental principle of administrative law that an agency is bound to adhere to its own regulations. Indeed, failure to do so can lead to arbitrary and capricious decision-making in violation of the APA."). An aggrieved party is therefore entitled to judicial review of the agency action. *See* D.C. Code § 2-510(a)(3); *see also Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988).

Here, BEGA acted in contravention of several of its rules. BEGA's rules, which are now codified as regulations in the D.C. Municipal Regulations, follow the two-step process mandated

by its authorizing statute: first, a preliminary investigation and, second, a formal investigation. BEGA is required to conduct its investigations “[f]airly and professionally; . . . [s]o as to protect the rights and reputations of public employees and officials; and . . . [i]n accordance with due process.” D.C. Mun. Regs., tit. 3, § 5300.2. As this filing should make evident, this investigation needlessly damaged Mr. Graham’s rights and reputation and was not conducted in accordance with due process.

In the normal course, BEGA first engages in a preliminary investigation, in which the Director presents evidence of a potential violation to the Board. D.C. Mun. Regs., tit. 3, §§ 5301.1, 5301.2. If BEGA finds that there is “reason to believe a violation has occurred,” it “may authorize a formal investigation and the issuance of subpoenas.” *Id.* § 5301.3. At the formal investigation stage, BEGA *must* (1) conduct an open and adversarial hearing at which the Director of Government Ethics shall present evidence of the violation.” *Id.* § 5401.1. The respondent is entitled to discovery in advance of the hearing. *Id.* § 5511.3. At the hearing, all parties may introduce evidence and witnesses on their behalf, cross-examine the other parties’ witnesses, and offer arguments in support of their positions. *Id.* §§ 5517.1, 5517.2. At the close of the adversarial hearing, the Board may ask for proposed findings of fact and conclusions of law. *Id.* § 5520.1. Finally, “[w]ithin a reasonable time after the conclusion of the hearing, the Board shall render its decision setting forth findings of fact and conclusions of law and giving the reasons for the decision.” *Id.* § 5521.1. “The conclusions or opinion in the decision shall be governed by and based upon all the evidence adduced at the hearing.” *Id.* § 5521.3. The decision “shall be supported by substantial evidence on the record.” *Id.* § 5521.4.

In issuing its Memorandum Opinion purporting to represent its “factual findings,” and its conclusion that Mr. Graham committed violations of the DC Code of Conduct based on

“substantial evidence,” BEGA adhered to *none* of its rules governing its investigative process. Mr. Graham was denied discovery, denied an opportunity to confront the evidence that BEGA considered in making its unlawful “findings,” denied a right to cross-examine the witnesses that participated in the Cadwalader internal investigation, which was of course ordered by WMATA for its own purposes in any event. There is no ambiguity in either the statute or in BEGA’s Rules that an adversarial hearing “shall” be held where BEGA finds “reason to believe” a violation occurred. The Board’s failure to adhere to its rules that would afford Mr. Graham required due process precluded it from making factual findings adverse to Mr. Graham, much less conclusions that the Board found by “substantial evidence” that Mr. Graham violated the DC Code of Ethics. Mr. Graham is likely to prevail on his argument that BEGA’s action in issuing its Memorandum Opinion containing factual findings and ultimate legal conclusions was arbitrary and capricious and must be overturned.

*c. BEGA’s Memorandum Opinion Violated Mr. Graham’s Procedural Due Process Rights.*

In his petition, Mr. Graham lastly argues that BEGA’s opinion denied him the due process afforded to him by the U.S. Constitution. “The fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1913). It is beyond cavil that procedural due process consistent with the Fourteenth Amendment is guaranteed in the context of administrative proceedings in which the government adjudicates important property and liberty interests. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (in context of parole proceedings, minimal requirements of due process held to include disclosure of evidence, opportunity to be heard and present witnesses, right to confrontation and cross-examination, a neutral and detached hearing body, a written statement by factfinders giving reasons for

decision); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (describing minimal due process requirements in welfare administration proceedings).

There can be no question that Mr. Graham was denied even the most minimal due process protections in this matter. As described above, his counsel's request for discovery was denied. His counsel's brief appearance before the Board, after repeated requests to do so, was limited to addressing the issues raised in Mr. Graham's response to the Cadwalader Report. It was not the adversarial hearing to which Mr. Graham was entitled under law and under BEGA's rules. Indeed, his counsel's response was informed only by the information contained in the four corners of the Cadwalader Report. Neither Mr. Graham nor his counsel has ever seen the written record on which BEGA made its "factual findings," nor did he have any opportunity to cross-examine the witnesses whose depositions were taken in a WMATA internal investigation, not in an adversarial proceeding in which Mr. Graham's counsel participated. BEGA's "findings" and conclusions inflicted serious reputational and professional harm on Mr. Graham while respecting none of his procedural due process rights under the Fourteenth Amendment. It is highly likely that a court will conclude that BEGA acted in violation of Mr. Graham's due process rights, and its Memorandum Opinion must be stricken.

## **2. Mr. Graham Will Suffer Irreparable Harm if an Injunction is not Granted.**

Mr. Graham will suffer irreparable harm if the BEGA's findings are not withdrawn. On the basis of the findings and conclusions in the BEGA opinion, Chairman Mendelson is poised to introduce resolutions – as soon as today -- to sanction Councilmember Graham. Even the very act of introducing these resolutions will cause Mr. Graham to suffer irreparable damage to his public and professional reputation. As an elected official, his success in office depends on his ability to maintain public confidence in his actions. For the Council to consider an official

reprimand will cause undue and devastating injury to his reputation and his ability to carry out his job.

If the Council were to decide to sanction Mr. Graham on the basis of the so-called findings in the BEGA opinion, it would be difficult to overstate the irreparable harm that Mr. Graham would suffer. These sanctions may include an official reprimand and loss of some of Mr. Graham's committee assignments. Graham Aff., Exh. 2. Such sanctions would cause grave and irreparable damage to Mr. Graham's professional reputation and ability to perform the position to which he was elected by his constituents. Furthermore, if the Council reprimands Mr. Graham based on BEGA's unlawful action, he will have no remedy at law to challenge the reprimand. Mr. Graham asks not that this Court enjoin the Council itself, but rather that it redress BEGA's unlawful conduct and thereby remove it as a viable predicate on which the Council and others may act.

Given the immediate likelihood of action by the D.C. Council, and the continuing harm Mr. Graham suffers in the court of public opinion, fueled by media articles rehashing BEGA's findings, Mr. Graham has no choice but to seek this Court's intervention to avoid immediate and irreparable harm.

### **3. The Injunction, If Granted, Will Not Injure Other Parties.**

An injunction will not cause any harm to other parties. The only other party to the underlying proceeding was BEGA itself. BEGA will suffer no conceivable harm from an order striking its unlawful factual findings and legal conclusions regarding Mr. Graham's conduct. BEGA should not have made those findings and conclusions in the first place. Further, Mr. Graham does not seek to disturb BEGA's separate February 7, 2013 Order of Dismissal of the preliminary investigation. Given BEGA's conclusion that it could not sanction Mr. Graham and

therefore should dismiss the investigation, the remedy of striking the Memorandum Opinion that BEGA never should have issued will end the matter as far as BEGA is concerned.

#### **4. An Injunction Would Be in the Public Interest.**

Finally, the public's interest in a credible ethics enforcement process supports Mr. Graham's request for relief here. Last year, the D.C. Council established BEGA to help restore public confidence in District government through independent enforcement of the District's ethics rules against public officials and District employees. For BEGA to live up to its mandate and establish a credible ethics process, it must conduct itself in accordance with its own rules and respect the rights of the subjects of its investigations. This request for injunctive relief will help restore the credibility of BEGA after its obvious missteps in the Graham matter.

Moreover, the need for BEGA to respect and adhere to the procedural rights afforded the subjects of its investigations is of great importance to a large number of citizens. BEGA is empowered to review alleged ethics violations by *any* District of Columbia employee, not just its elected officials. And yet, in BEGA's "inaugural" investigation, it exceeded its statutory authority, ignored its newly enacted rules, and proceeded to make both factual findings and legal conclusions adverse to Mr. Graham without providing the due process which he is guaranteed under the DC Administrative Procedure Act as well as the U.S. Constitution. If BEGA can do such a thing in a high profile matter, it could well repeat its conduct in less visible matters involving private citizens defending their reputations and livelihoods against allegations of unethical conduct.

Furthermore, it would be contrary to the interests of Mr. Graham's constituents to sanction him. The residents of Ward 1 elected Mr. Graham to represent them in the D.C. Council. He has done so admirably and tirelessly. It is critical to his effectiveness on the

Council that he maintain his professional reputation and continue to serve on his committees. And, finally, it is the best interests of the entire District that its elected officials not be subjected to an ethics regime that renders ultimate judgment without a modicum of due process.

### CONCLUSION

For the foregoing reasons, Mr. Graham respectfully requests that this Court enter a temporary restraining order and a preliminary injunction ordering BEGA to withdraw its Memorandum Opinion, as set forth in the Proposed Order submitted herewith.

Dated: February 21, 2013

Respectfully submitted,

/s/ Caroline J. Mehta  
Caroline J. Mehta, D.C. Bar No. 471935  
William W. Taylor, D.C. Bar No. 84194  
Rachel F. Cotton, D.C. Bar No. 997132  
Zuckerman Spaeder LLP  
1800 M Street, N.W., Suite 1000  
Washington, D.C. 20036  
Tel: (202) 778-1836  
*Attorneys for Councilmember Graham*

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

**CIVIL DIVISION**

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<b>JIM GRAHAM</b>	)
	)
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	)
<b>v.</b>	)
	)
	)
<b>DISTRICT OF COLUMBIA BOARD OF ETHICS</b>	)
<b>AND GOVERNMENT ACCOUNTABILITY</b>	)
	)
	)

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**[PROPOSED] ORDER**

Upon consideration of the papers and arguments of counsel, Councilmember Jim Graham's Motion for a Temporary Restraining Order and a Preliminary Injunction pursuant to Rule 65 of the Superior Court Rules of Civil Procedure is hereby GRANTED.

IT IS HEREBY ORDERED that the District of Columbia Board of Ethics and Government Accountability withdraw its February 7, 2013 Memorandum Opinion.

**IT IS SO ORDERED.**

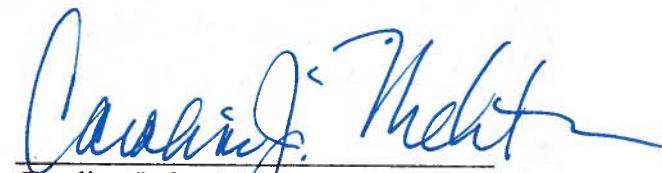
Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

## CERTIFICATE OF SERVICE

I, Caroline Judge Mehta, hereby certify that on this 21st day of February 2013, a true and accurate copy of the Motion for Temporary Restraining Order and Preliminary Injunction, Memorandum in Support of the Motion for Temporary Restraining Order and Preliminary Injunction, and Proposed Order were served electronically and by hand, as noted below, upon the following:

- Mr. Darrin P. Sabin (Electronically and By Hand)  
Director of Government Ethics  
Board of Ethics and Government Accountability  
Office of Government Ethics  
441 4th Street, N.W., Suite 830 South  
Washington, D.C. 20001  
EMAIL: darrin.sabin@dc.gov
- 
- \*\*\* Mr. Sabin was served electronically on February 20, 2013.
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- Office of the Attorney General (By Hand)  
District of Columbia  
441 4th Street, NW  
Washington, DC 20001
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Caroline Judge Mehta  
Zuckerman Spaeder LLP  
1800 M. Street, N.W., Suite 1000  
Washington, D.C. 20036